SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

October Term, 1964
No. 562

THE QUECHAN TRIBE OF THE FORT YUMA RESERVATION,

Petitioner,

vs.

CLYDE F. THOMPSON, *et al.*, and ERNEST RISLING, *et al.*, members, and as the representatives of, and on the relation of the INDIANS OF CALIFORNIA,

and

THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

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SUBJECT INDEX

	Page
Citations to opinions below	2
Jurisdiction	2
Questions presented	2
Statute involved	2
Statement	3
Reasons for granting the writ	10
Conclusion	16
Appendix	
Order of the court of claims	1
Order determining issue remanded by the United States court of claims	2
Opinion of the commission	4
Final determination or judgment	11

TABLE OF AUTHORITIES CITED

Cases — Page

Indians of California v. United States, 98 Ct. Cls. 583, 102 Ct. Cls. 837 ..... 4, 6, 7

Thompson, et al. v. United States, 122 Ct. Cls. 348, cert. den. 344 U. S. 856 ..... 5, 15

Statutes

Act of May 18, 1928, 45 Statutes 602 ..... 3, 11

Act of April 29, 1930, 46 Statutes 259 11

Act of June 30, 1948, 62 Statutes 1166 11

Act of May 24, 1950, 64 Statutes 189 11

Indian Claims Commission Act, Sec. 2 ..... 2, 4

Indian Claims Commission Act, Sec. 10 ..... 3, 5, 13

Indian Claims Commission Act, Sec. 20(b) 4

Indian Claims Commission Act, Sec. 20(c) 2

9 Statutes at Large, p. 922 12

60 Statutes at Large, p. 1049 ..... 2, 4

United States Code, Title 28, Sec. 1255(1) 2

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS.

Petitioner prays that a writ of certiorari issue to review an order of the United States Court of Claims, which affirmed an order of the Indian Claims Commission. The Commission's order held that the petitioner is not a proper party to, and, therefore, not entitled to intervene in the class suit brought against the United States, by Clyde F. Thompson, *et al.*, and Ernest Risling, *et al.*, as representatives of the Indians of California.

Citations to Opinions Below.

The order of the Court of Claims is unreported and is printed in the appendix hereto *infra*, page 1. The order of the Indian Claims Commission is unreported, and is printed in the appendix, page 2. The opinion of the Commission printed in the appendix hereto *infra*, page 4, is reported in 13 Ind. Cl. Comm. 89. There is also printed in the appendix, page 11, the final judgment of the Commission in the Indians of California case.

Jurisdiction.

The order of the Court of Claims, which is final as to the rights of petitioner, was entered on July 8, 1964. The jurisdiction of this Court is invoked under 28 U. S. C. Section 1255(1); and, also, under Section 20(c) of the Indian Claims Commission Act, 60 Stat. 1049.

Questions Presented.

Whether, in the settlement of a class suit before the Indian Claims Commission, certain members of the class, who have brought suits on their own behalf, can be permitted to intervene, in effect, and to share in the judgment, and this right denied to others who are in the same position.

Statute Involved.

The statute involved is the Act of August 13, 1946, which created the Indian Claims Commission, 60 Stat. 1049. Section 2 of that Act provides in part as follows:

> "Sec. 2. The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other iden-

tifiable group of American Indians residing within the territorial limits of the United States or Alaska: . . . (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; . . ."

Section 10 of the Act provides:

"Sec. 10. Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission."

Statement.

For many years, the Indians of California have been treated as a single class. In 1928, Congress passed an Act which partially compensated them for the taking of their lands. 45 Stat. 602. Under this Act, the attorney general of California was authorized to bring suit against the United States to recover the value of certain land which had been set aside as a reservation for the Indians by treaty with some of the California tribes, a treaty which the Senate did not ratify. Recovery was had for all Indians of California, who shared individually and equally therein, whether or

not their tribes were parties to the treaty, and whether or not they had any interest in the treaty lands. *Indians of California v. United States,* 98 Ct. Cls. 583 (1942), 102 Ct. Cls. 837 (1944).

In 1946, Congress enacted the Indian Claims Commission Act, 60 Stat. 1049, which was a general jurisdictional Act designed to dispose of all Indian grievances, instead of having them handled by special jurisdictional acts as had been the practice in the past. Section 20(b) of the Act provides for appeals to the Court of Claims from decisions of the Commission.

Under this Act, two groups of individuals filed suit as representatives of the Indians of California. The claims of the two groups, Thompson, *et al,* and Risling, *et al.,* respondents herein, were later consolidated by agreement. They sought to recover for the uncompensated taking by the government of all California land owned by the Indians, less the amount previously paid under the 1928 Act. Various other tribes, or groups of tribes, including the Quechan, generally known as the Yuma Indians, petitioners herein, filed claims on their own behalf seeking to recover the value of specific land, in some cases partly within and partly without the present State of California, which had been owned by their ancestors, and taken by the government without compensation.

The Government moved to dismiss the petition of Thompson, *et al.,* on the ground that the Indians of California, which admittedly was not a "tribe" or "band", was, also, not an "identifiable group", within the meaning of Section 10 of the Indian Claims Commission Act, and thus entitled to file a claim under Section 2 of that Act. The Commission agreed and dismissed the petition, 1 Ind. Cl. Comm. 366 (1950). The pe-

titioners appealed to the Court of Claims and the order was reversed. *Thompson, et al. v. United States,* 122 Ct. Cls. 348 (1952), Certiorari denied, 344 U. S. 856. The Court of Claims based its decision upon the same ground which had impelled Congress to recognize and treat the Indians of California as a single class under the 1928 Act, this being the fact that most of the California tribes had been destroyed or dispersed by the white settlers during and after the gold rush, beginning in 1848; and the Court concluded that the Indians of California should be recognized as a class for the purpose of suing under the 1946 Act.

In this situation, there was a conflict between the claim of the Indians of California as a whole, represented by Thompson, *et al,* and the claims filed by separate tribes or bands asking compensation for specific areas of California land occupied by their ancestors. Thompson, *et al,* claimed the exclusive right to represent all Indians of California. The Commission held that under Section 10 of the Act, the separate tribes had the right to maintain their own cases. 6 Ind. Cl. Comm. 86 (1958).

Before that ruling, the Yana, Shasta and Yokiah tribes and the Mission Bands, all of whom had filed separate claims, had joined with the Indians of California, under stipulations, approved by the Commission, which provided that if it were finally held that the Indians of California were entitled to recover, they would dismiss their own cases; otherwise, that they would be free to resume the prosecution of their separate claims. The claims of the Yokiah, Yana and Shasta tribes, on the joint motion of those tribes and Thompson, *et al,* were later consolidated for all pur-

poses with the main claim of the Indians of California. 6 Ind. Cl. Comm. 674. The Mission Bands were permitted to withdraw and to proceed on their own. 6 Ind. Cl. Comm. 666, 669-671. Nine other tribes, including the Quechan and the Pit River Indians, also proceeded with their own cases.

By the last mentioned order, the Commission divided the State of California into Area A and Area B, for the purposes of the *Indians of California* case. Area A is the portion of the State covered by claims of the Indians who had separate suits pending as of the date of the order, October 6, 1958. It included the California land of the Quechan, and also the land of the Mission and Pit River Indians. The remainder of the State was put in Area B, this being the area to which the *Indians of California* in the main case were then entitled under the terms of the Commission's order, including the land covered by the claims of the Yana, Yokiah and Shasta tribes, theretofore consolidated with the main case.

Under its practice in the case of claims for the taking of Indian land without compensation, the Commission holds a trial first on the issue of liability, and if it finds in favor of the petitioner, enters a judgment holding the defendant liable for the taking of a certain area of land, and determines the date of taking. Another trial is then held to determine the value of the land on the date of taking. The issue of liability was tried in the *Indians of California* case, and it was held that the petitioners were entitled to recover the value of the land in Area B as of the date of taking, which was determined to be in 1853. 8 Ind. Cl. Comm. 1 (1959). Liability trials were also held in various in-

dependent cases, including that of the Quechan, who were held to be entitled to recover for the value of their California land as of 1853, and for the value of their Arizona land as of 1884. 8 Ind. Cl. Comm. 111a (1959). Judgment of liability was also rendered for the Pit River Indians on their separate claim. 7 Ind. Cl. Comm. 815 (1959).

Both the defendant and the petitioners, Thompson, *et al,* appealed to the Court of Claims from the Commission's judgment of liability in the main *Indians of California* case. The government contended, among other things, that recovery could not be supported except on proof of each specific area occupied by each tribe represented in the group, which the petitioners had been unable to do and had not attempted to do, their evidence establishing only that the entire area had been occupied by Indian tribes. The petitioners, Thompson, *et al.,* appealed from the part of the Commission's order holding that they did not have the exclusive right to represent all California Indians, and from the order dividing the State into Area A and Area B. The Quechan filed a brief as *amicus curiae* supporting the position of the Indians of California on the issue of liability, but opposing their claim to the exclusive right of representation. The Quechan brief also requested the Court of Claims to rule on the right of the independent tribes to intervene in the main action, and to state the conditions of such intervention.

In the early part of 1963, further proceedings in the appeal were suspended by stipulation of the Indians of California and the defendant. Upon learning that negotiations for settlement were in progress, the Quechan tribe filed a motion for leave to intervene. They

offered to dismiss their own suit, insofar as it pertained to their California land, and to have its value added to the general fund. The motion was unopposed and was allowed by the Court on June 21, 1963. After unsuccessful negotiations looking toward the inclusion of the Quechan and their California land in the settlement, the Quechan tribe filed a formal petition in intervention in the Court of Claims. A motion was filed by the defendant, the United States, asking that the petition be dismissed or, in the alternative, that the issue be remanded to the Indian Claims Commission. A similar request was made by the Indians of California.

In the meantime, a settlement agreement had been reached by the attorneys for the defendant and the attorneys for the Indians of California, including the Yana, Shasta and Yokiah tribes, and the attorneys for the Pit River and the Mission Indians. Under the terms of the settlement, it was provided that the claims of these tribes and that of the Indians of California would be consolidated for all purposes, and a single judgment entered. *Individual members of all the petitioners will share equally in the award as a single class, without any distinction being made on account of the number of surviving members of any tribe, or the extent or value of the land once occupied by the tribe.* This is the same basis on which the Indians of California, *including the Quechan,* shared, and continue to share, in the judgment fund obtained under the 1928 Act.

The stipulation between the attorneys for the petitioners who participated in the settlement further provided that the single class for whom the judgment would be entered ". . . comprises the Indians of California

(as hereinafter defined), Mission Indians of California and Pit River Indians of California". The phrase, "Indians of California", was defined as ". . . all members of a class or group consisting of descendants of 'all those California Indians who were residents of California on June 1, 1852' ". The stipulation continued, ". . . it being understood and agreed that it will be left to the Indian Claims Commission or the Congress to determine whether for purposes of participation in said single judgment fund, the class known as Indians of California should include those Indians who are now represented in other pending claims before the Indian Claims Commission involving lands in California, namely. . . ." Then followed the names of all of the tribes having independent and unconsolidated suits pending at the time, except the Pit River and Mission Indians. Both of these tribes had independent suits pending, but they were included in the settlement. The Mission case had not been tried, but the Pit River case had been, and, as noted above, a judgment of liability had been entered. 7 Ind. Cl. Comm. 815 (1959).

The petition in intervention alleges, and it must be taken as admitted, for the purpose of the motion to dismiss, that all members of the Quechan tribe are descended from Indians who were residents of California on June 1, 1852, and thus are within the factual definition of the class as set forth in the settlement agreement.

On February 10, 1964, the Court of Claims made an order by which the order of June 21, 1963, allowing the motion to intervene was, *sua sponte*, vacated, and the issue as to whether or not the intervenors were proper parties in the main case was remanded to the

Indian Claims Commission for its determination. The parties stipulated for the matter to be decided by the Commission upon the documents filed in the Court of Claims. This stipulation was filed with the Commission on February 28, 1964, and on March 3, 1964, the Commission made its order determining that the petitioner is not a proper party in the case, and filed its opinion on the same date, *infra,* page 4.

Notice of appeal by the intervenor was filed with the Indian Claims Commission on March 11, 1964. After various motions and briefs had been filed, the Court determined the case, without oral argument, by its order of July 8, 1964, *infra,* page 1, affirming the order of the Indian Claims Commission.

Thereafter, the appeals in the main case having been dismissed, and the record returned to the Indian Claims Commission, the Commission made its "Final Determination or Judgment" dated July 20, 1964, *infra,* page 11, determining that the petitioners in the consolidated dockets were entitled to recover from the defendant the net sum of $29,100,000.00, as a single class, the members of the class being as defined in the order of March 3, 1964, which is the order complained of herein.

Reasons for Granting the Writ.

1. The case is special and important because it involves the rights of other nations, Indian tribes, whose members are, in a sense, wards of the United States.

2. Many individuals are affected by the decision below. There are over 1500 members of the Quechan or Yuma tribe, all of whom are within the factual definition of the class, Indians of California, for whom this

suit was brought, and for whom judgment has been entered. All of them, except those who were born after the cut-off date for the taking of the roll, May 24, 1950, are on the roll of the Indians of California established by the 1928 Act as amended (Act of May 18, 1928, 45 Stat. 602 as amended by Acts of April 29, 1930, 46 Stat. 259, June 30, 1948, 62 Stat. 1166, and May 24, 1950, 64 Stat. 189). Among the members of the six other excluded tribes (see Footnote 2 of the Commission's opinion, page 7, *infra*), there are an unknown but substantial number of Indians who are also members of the Indians of California. Whether these people have any right of choice has never even been discussed in any opinion of the Commission, and it is likely that most of them don't know what has happened to them.

3. The Indian Claims Commission has departed from the accepted and usual course of judicial proceedings, in that its decision, excluding a large segment of the class, was based upon prior orders which did not purport to decide the question, chiefly upon a procedural order adopted for administrative convenience, the so-called A and B order, dividing the State of California into two areas, one consisting of land claimed, in the then posture of the case, by the Indians of California, including the Yana, Shasta and Yokiah tribes, who had then joined with the main group, and the other consisting of land claimed by tribes or groups who were at that time prosecuting their own claims, the latter group then including both the Pit River and the Mission Indians.

In its opinion given in connection with the A and B order, the Commission said:

"Dividing the lands as shown above is for the purpose of simplifying the procedure for presenting and determining the rights of all litigants asserting claims to lands in California, . . ."

6 Ind. Cl. Comm. 666 at 673 (1958).

When the Commission made its interlocutory order of liability in 1959, no further changes in alignment had occurred, and the order held the Government liable for the value, to be thereafter determined, of the land in Area B, with certain exceptions not material here. The land of the Mission and Pit River Indians, as well as the California land of the Quechan, was in Area A at that time. If there had been any intent for this order to establish a final segregation of the tribes, and there was no mention of any such intent, it would have applied to the Mission and Pit River Indians.

The Commission did note, in this order, that the petitioners stated a cause of action for ". . . all those California Indians who were residents of California at the time we acquired it, and their descendants." 8 Ind. Cl. Comm. 1 at 16 (1959). It will be observed that this is practically the same definition of the Indians of California as that set forth in the stipulations pursuant to which the final judgment was entered upon the settlement of the case. *Supra*, p. 9. It is a little broader because we acquired California under the treaty of Guadalupe Hidalgo in 1848. (9 Stat. 922.)

None of the prior orders, upon which the Commission depended in defining the class as a matter of law, contained any requirement that the other tribes or their members should make an election beween recovering for their own land or sharing with the main

group. It is true that in the order which held that the Indians of California could not represent the independent tribes against their will, and that those tribes had the right to maintain their own actions under Section 10 of the Act, a majority of the Commission expressed the view that the Yana, Shasta and Yokiah, who were then in the main case by agreement, should withdraw and proceed with their own cases. 6 Ind. Cl. Comm. 86 (1958). At that time, the majority apparently felt that the tribes who had filed separate suits not only had the right, but should be required, to carry on with them. However, later in the same year, on motion of these three tribes and the Indians of California, their cases were consolidated for all purposes, thus, in effect, permitting them to intervene. 6 Ind. Cl. Comm. 674 (1958).

Even if there had been any order requiring an election, it has been vacated by permitting the Pit River and Mission Indians to come in to the case. They have, in effect, intervened, and on precisely the same terms upon which the Quechan seek to intervene, that is to say, adding the value of their land to the general fund, and participating in the judgment in the main case as members of a single class. Furthermore, the motion of the Quechan for leave to intervene had been made, and allowed, before the Pit River and Mission Indians came in. The Quechan have never intentionally made any final election to proceed with their own case, but on the contrary have at all times claimed and reserved the right to intervene in the main action.

The Commission in its opinion concedes that the Pit River Indians and the Mission Indians are procedurally in the same position as the Quechan, and says: "The question as to which group of claimants are to be in-

cluded in compromise negotiations is between the parties involved and defendant". Page 9, *infra*. *This overlooks the fact that the Pit River, Mission, and Quechan are all members of the same class, Indians of California,* and that the compromise negotiations involved here were negotiations for the settlement of the class suit. By the settlement, the Pit River and Missoin Indians are in effect, permitted to intervene, and their land is, in effect, removed from Area A and put into Area B. While the Federal Rules of Civil Procedure do not apply to the Indian Claims Commission or the Court of Claims, it is submitted that the equitable principles embodied in those rules do apply, and that there can be no discrimination between members of the class in the settlement of a class suit.

The Commission erred in its assumption that there is no prejudice to the Quechan by the exclusion, since they have their own suit. The prejudice is very real and practical. Not only is it a blow to their pride to be excluded, arbitrarily, as they think, from the class to which they have always belonged, but they will recover less in their own suit than they would in the main case. Presumably, this is also true of the five other tribes, the Yana, Shasta, Yokiah, Pit River, and Mission Indians, who have elected, in accordance with the privilege accorded to them, but denied to the Quechan, to intervene in the main case.

As noted above, the recovery in the main case is joint, and the recovery by independent tribes for their own land in separate cases is, therefore, necessarily different. This is the only fair and practicable method of making an award for the Indians of California. Otherwise, a few Indians, if they could be identified, whose ancestors occupied the land under which the gold veins

lay, would receive most of the compensation, and there would be only a pittance for large numbers whose lands were of little value in 1853, which was true of most of the State. Any factual difference between the Quechan and the included tribes, in this respect, is no greater than differences which exist among those included. The decision of the Court of Claims in *Thompson v. United States,* 122 Ct. Cls. 348, cut across all such distinctions when it held that the Indians of California constituted an identifiable group, which could maintain a suit under the 1946 Act.

There is also a factual difference, in that the land of the Pit River and Mission Indians, as well as the land of the Yana, Shasta and Yokiah, tribes, was situated entirely in the present State of California, and part of the land of the Quechan and other excluded tribes lay outside the boundaries of the present State of California. In the case of the Quechan, approximately one-half was in California, and one-half in Arizona. This does not alter the fact that all of the Quechan are Indians of California. The fact that they have another cause of action, *i.e.,* to recover for their Arizona land, should not change their rights in respect of their California land. The Mission Indians, although all of the land for which they seek recovery against the United States, was in California, also have other claims pending before the Commission which are not covered by the settlement. The Commission did not rely on this difference, and properly so. Its decision is based entirely on its own prior orders, and the result is necessarily a discrimination between the Mission and Pit River Indians and the Quechan, who were in the same position in relation to those orders. There

is also discrimination between the Quechan and the Yana, Shasta and Yokiah tribes. Although these tribes were included in the main case at a much earlier stage, there was no direction by the Commission, then or later, requiring the tribes now excluded to make an election.

It is submitted that the legal question of the optional right of an independent tribe or its members, who are also in fact, members of the class, Indians of California, to participate in the general recovery for that class, rather than in a recovery for a specific area of California occupied by their own ancestral tribe, has never been adjudicated on the merits, that the Commission did not decide this case on the merits, and that there has been an unjust discrimination against part of the Indians of California, by extending the option to some and denying it to others.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

WM. DOUGLAS SELLERS,
Attorney for Petitioner.

Dated: October 2, 1964.

FULTON W. HOGE,
Of Counsel.

APPENDIX.

Order of the Court of Claims.

In the United States Court of Claims.

The United States of America, Appellant-Appellee, v. Clyde F. Thompson, Et Al., and Ernest Risling, Et Al., Appellants-Appellees, The Quechan Tribe of the Fort Yuma Indian Reservation, Intervenors-Appellants. App. No. 2-61.

This case comes before the court on motion of Clyde F. Thompson, et al., and Ernest Risling, et al., for an order denying the petition for intervention filed by the Quechan Tribe of Fort Yuma Indian Reservation on November 19, 1964, or, alternatively, an order affirming the order of the Indian Claims Commission entered March 3, 1964, determining that the Quechan Tribe of the Fort Yuma Indian Reservation is not a proper party in the cases of Clyde F. Thompson, et al., and Ernest Risling, et al., as representatives of the Indians of California. Upon consideration thereof, together with the opposition thereto and the briefs of the parties, and without oral argument,

It is Ordered that the said motion of Clyde F. Thompson, et al., and Ernest Risling, et al., be and the same is granted in that the said order of the Indian Claims Commission of March 3, 1964, be and the same is affirmed.

July 8, 1964.

By the Court
Marvin Jones
Chief Judge

Judge Davis took no part in the consideration and decision of this case.

Order Determining Issue Remanded by the United States Court of Claims.

Before the Indian Claims Commission.

Clyde F. Thompson, et al., (Indians of California), Petitioners, Docket No. 31. Ernest Risling, et al., (Indians of California), Petitioners, Docket No. 37. The Quechan Tribe of the Fort Yuma Indian Reservation, Petitioners, (and Plaintiffs in Intervention) Docket No. 319. (In the United States Court of Claims, Appeal No. 2-61). v. The United States of America, Defendant.

This matter comes before the Commission at this time on an order entered by the United States Court of Claims on February 20, 1964, remanding the issue as to whether or not the Quechan Tribe of the Fort Yuma Indian Reservation is a proper party in the cases of Clyde F. Thompson, et al., and Ernest Risling, et al., as representatives of the Indians of California, and, if so, its interest therein.

Upon consideration thereof, together with the joint stipulation of the parties, filed on February 28, 1964, and for the reasons set forth in the opinion this date filed herein.

It Is Determined that the Quechan Tribe of the Fort Yuma Indian Reservation is not a proper party in the cases of Clyde F. Thompson, et al., and Ernest Ris-

ling, et al., as representatives of the Indians of California, which cases are now on appeal before the United States Court of Claims.

Dated at Washigton, D. C., this 3rd day of March, 1964.

Arthur V. Watkins,
Chief Commissioner

Wm. M. Holt,
Associate Commissioner

T. Harold Scott,
Associate Commissioner.

Opinion of the Commission.

Before the Indian Claims Commission.

Clyde F. Thompson, et al., (Indians of California), Petitioners, Docket No. 31. Ernest Risling, et al., (Indians of California) Petitioners, Docket No. 37. The Quechan Tribe of the Fort Yuma Indian Reservation, Petitioners, (and Plaintiffs in Intervention) Docket No. 319. (In the United States Court of Claims, Appeal No. 2-61), v. The United States of America, Defendant.

Decided: Mar. 3, 1964.

Appearances: Robert W. Barker, Walter M. Gleason and Fulton W. Hoge, Attorneys of Record for Petitioners.

Ralph A. Barney, with whom was Mr. Assistant Attorney General, Ramsey Clark, Attorneys for Defendant.

Per Curiam:

The subject cases are now before the Commission upon order of the Court of Claims, dated February 20, 1964, which remanded them for the sole purpose of determining whether the Quechan Tribe of the Fort Yuma Indian Reservation is a proper party in Docket Nos. 31 and 37, and, if so, its interest therein. This issue has arisen upon motion of the Quechan Tribe for leave to intervene, originally filed before the Court of Claims on April 2, 1963. That motion was allowed on June 21, 1963. On December 18, 1963, defendant filed a motion to dismiss the petition of intervention or, alternatively, to remand the issue raised by said petition to this Commission. By its order of February 20,

1964, the Court of Claims vacated its order of June 21, 1963, and remanded this sole issue to this Commission.

By stipulation, filed February 28, 1964, the parties have agreed that the issue remanded by the Court of Claims will be determined upon the pleadings previously filed before the Court of Claims and that Court's orders thereon. We have all such pleadings and other documents relating to this issue before us and, having considered the same, we conclude that the Quechan Tribe of the Fort Yuma Indian Reservation is not a proper party in the cases brought by Clyde F. Thompson, et al., and Ernest Risling, et al. as representatives of the Indians of California, Dockets Nos. 31 and 37 before this Commission.

Briefly, our reasons for so holding are as follows. The two subject cases filed by Thompson and others (Docket 31) and by Risling and others (Docket 37) on behalf of and as representatives of the Indians of California were similar claims whereby each sought to establish an exclusive right to represent all of the enrolled Indians of California and to recover for all lands in California aboriginally used and occupied by "California Indians." There were also some 15 other claims filed by separate "tribes or bands" each seeking recovery for certain areas of land, either wholly or in part within the limits of the present State of California. Included among these 15 other claims was the Quechan Tribe of the Fort Yuma Reservation of California. The Quechan Tribe's claim (which related to lands in California and Arizona) was assigned docket number 319. The Quechan Tribe maintained before this Commission that it had the exclusive right to represent the

Quechan Indians. The issue of representation was decided by this Commission on January 20, 1958. It was then determined that the Thompson and Risling petitioners (Dockets Nos. 31 and 37) did not have the exclusive right to represent all Indians of California and that the other claimants, including the Quechan Tribe, could maintain their own separate claims. Thereafter, on October 6, 1958, the Commission ordered that all of California be divided into two major areas. The area described as Area A included all lands in the State of California which were claimed in separate suits by tribes which had been held entitled to sue independently of the "Indians of California" i.e. Dockets Nos. 31 and 37. The Quechan Tribe (Docket No. 319) was specifically designated as an Area A petitioner. All remaining lands were designated Area B.[1]

On July 31, 1959, the Commission determined that the petitioners in Dockets 31 and 37 had established original Indian title to the "Area B" lands in the State of California (except the Spanish and Mexican private land grants). In the Interlocutory Order entered by the Commission the "Area A" lands, which included the lands claimed by the Quechan Tribe, were specifically excepted.

Therefore, by the decisions of this Commission the claims of the petitioners in Dockets 31 and 37 have

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[1]Actually Area B included the lands in California claimed by the Yokiah Tribe (Docket 176), Yana Tribe (Docket 215) and the Shasta Tribe (Docket 333). Those three tribal claims were upon joint motion of the parties consolidated with Dockets 31 and 37 for all purposes including judgment by order of this Commission under date of October 6, 1958.

been restricted to representative actions on behalf of "the Indians of California" *except* those whose claims were to be maintained by separate tribal organizations, which separate claimants were specifically held to be entitled to maintain their respective claims independently of the Dockets 31 and 37 petitioners.[2] This Commission has determined that the petitioners in Dockets 31 and 37 have established Indian Title to the lands in California *except* those lands which have been claimed by the separate tribal claimants (as enumerated). Therefore, the claims brought by petitioners in Dockets 31 and 37 have been restricted by decisions of this Commission to a circumscribed group of "Indians of California" which excludes specifically the Quechan Tribe. Clearly, then, the remanded question from the Court of Claims must be answered in the negative. The claim of the Quechan Tribe has been specifically excluded from the claims to be determined in the matter of Dockets 31 and 37.

The Quechan Tribe has raised some arguments to which we shall make specific reference. In its response (filed January 22, 1964) to defendant's motion to dismiss the petition in intervention the tribe contended that "the Quechan Tribe or its members are members of the class, known as the Indians of California, for whom the suit is brought." It is true that petitioners

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[2]The petitioners which were to proceed with their respective claims independently of Dockets 31 and 37 were: Northern Paiute Nation, Docket 87; Southern Paiute Nation, Docket 88; Mohave Tribe, Dockets 283 and 295; Washoe Tribe, Docket 288; Quechan Tribe Docket 319; Pitt Rivers, Docket 347; Chemehuevi Tribe, Docket 351; Klamath and Modoc Tribes, Docket 100; and Mission Bands, Docket 80.

in Dockets 31 and 37 originally argued that they did represent *all* Indians of California, which would have included Quechan Indians. However, they did not prevail in their argument before this Commission, and we have found their representation extends only to the restricted identifiable group of "Indians of California" which does not include those tribes (one of which is Quechan) which have filed their own separate claims. One sentence has been quoted from our July 31, 1959, decision as indicating that our determination was not intended to disregard the 1928 Act (the jurisdictional Act of May 18, 1928, 45 Stat. 602, by which Congress established an enrollment of California Indians). The quoted sentence reads as follows:

> We are not to be understood as holding that the enrollment of Indians under the 1928 Act and its amendments is to be ignored for it might well be that, should an award be made, the Congress would order a distribution of the award on the basis of such enrollment as the only practical way of distributing an award after the lapse of over a century. (8 Ind. Cl. Comm. 1, 16.)

This sentence is not related in any manner to our decision in this matter and would, we now believe, have been better left unsaid. Our speculation as to how Congress might accomplish distribution of a prospective award should not have been embodied in our opinion.

Of course it is incumbent upon this Commission to determine the ownership of a claim. We must in our awards define the tribe, band or identifiable group entitled to the judgment. In this case that identifiable group represented by petitioners in Dockets 31 and 37

and entitled to the ultimate award envisioned by this Commission would be the Indians of California except those tribes, bands or identifiable groups which filed their own separate claims, as specifically defined in our decisions of January 20, 1958, and October 6, 1958. Any question as to how the 1928 Act enrollment or any other enrollments might be utilized in effecting any distribution of an award is beyond our jurisdiction and responsibility.

The parties have argued the merits of including the Pitt River Indians and the Mission Indians in a proposed compromise setlement involving Dockets 31 and 37 as well as Dockets 347, 80 and 80-D. Of course neither the Pitt River Indians nor the Mission Indians are included in any compromise negotiations as a matter of right arising from any of our decisions. Both groups are without the circumscribed "Indians of California" identifiable group represented by Dockets 31 and 37 and are included in "Area A." In that respect they are no different than the Quechan Tribe. The question as to which groups of claimants are to be included in compromise negotiations is between the parties involved and defendant. The reasons and merits for including or excluding certain groups is not an issue before us.

The Quechan Tribe has also referred to prejudice to its rights if intervention is not permitted in the Dockets 31 and 37 claims. We can see no basis for such a contention. The proposed compromise settlement in no way affects the claim of the Quechan Tribe.[3] The

[3]In our decision of September 30, 1959, in the matter of Docket No. 319 (Quechan Tribe, 8 Ind. Cl. Comm. 111a) we found that the Quechan Tribe of the Fort

lands claimed by the Quechan Tribe are excluded from the area involved in the proposed settlement The members of the Quechan Tribe are not members of the identifiable group represented by the petitioners in Dockets 31 and 37. In connection with the presentation of the matters pending on appeal before the Court of Claims it appears that the Quechan Tribe was named as an adverse party to the appeal filed by the Dockets 31 and 37 petitioners. Therefore the Quechan Tribe is a party to that appeal and should be in a position to fully defend its rights in respect to the matters pending in that appeal.

Arthur W. Watkins,
Chief Commissioner

Wm. M. Holt,
Associate Commissioner

T. Harold Scott,
Associate Commissioner

Yuma Reservation, California, had a tribal organization and was entitled to maintain the claim set fortn in its amended petition for the lands alleged to have been owned by the Quechan Tribe. We determined that the tribe had held certain lands in California and Arizona and that said lands had been taken by defendant.

Final Determination or Judgment.

Before the Indian Claims Commission.

Clyde F. Thompson, *et al.*, Docket No. 31. Ernest Risling, *et al.*, Docket No. 37. The Baron Long, *et al.*, Bands of Mission Indians of California, Docket Nos. 80 & 80-D. The Pitt River Indians of California, Petitioners, Docket No. 347. Consolidated. v. The United States of America, Defendant.

Upon motion for judgment filed pursuant to a stipulation of compromise settlement, filed herein and incorporated by reference in this determination or judgment; it appearing that appeals by the United States and Clyde F. Thompson, et al., and Ernest Risling, et al. (Court of Claims Appeal 2-61) have been dismissed by the United States Court of Claims; the Commission having held a hearing on the proposed settlement in Los Angeles, Fresno and Eureka, California, and Washington, D. C. on May 13, 14, 15, 18, 19, 22 and 23 and June 3, 4 and 5, 1964, evidence both oral and written having been received and considered; and Findings of Fact and an Opinion having been made and entered in said matter; it further appearing that said compromise settlement was held to be fair and just to all of the parties and has been duly approved by the Indian groups concerned and the authorized representative of the Secretary of the Interior; that final determination or judgment should be entered in accordance with said Stipulation, Findings of Fact and Opinion and the order of consolidation entered herein on this date;

Now, Therefore, it Is Ordered, Adjudged and Decreed that the motion for final determination or judg-

ment pursuant to said stipulation, filed herein, be and the same is hereby granted; that petitioners in said consolidated dockets do have and recover of and from the defendant the net sum of $29,100,000; that said determination or judgment be a single judgment in favor of all of the petitioners (as representatives of the tribes, bands or groups on whose behalf said petitions were presented, as construed and defined by our order of March 3, 1964, in Dockets 31, 37 and 319) as a single class.

Dated at Washington, D. C., this 20th day of July, 1964.

Arthur V. Watkins,
Chief Commissioner

Wm. M. Holt,
Associate Commissioner

T. Harold Scott,
Associate Commissioner

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SUPREME COURT, U. S.

No. 562

FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE QUECHAN TRIBE OF THE FORT YUMA RESERVATION,
Petitioner,

v.

CLYDE F. THOMPSON, ET AL., and ERNEST RISLING, ET AL., members, and as the representatives of, and on the relation of the Indians of California,

and

THE UNITED STATES OF AMERICA, *Respondents.*

On Petition for Writ of Certiorari to the United States Court of Claims

---

BRIEF FOR CLYDE F. THOMPSON, ET AL., AND ERNEST RISLING, ET AL., IN OPPOSITION

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INDEX

	Page
Opinions below	1
Jurisdiction	2
Question presented	2
Statement	3
Argument	9
Conclusion	12
Appendix A	13
Appendix B	23

CITATIONS

CASES:

Clyde F. Thompson, 122 C. Cls. 348, cert. den. 344 U.S. 856	9
Graver Mfg. Co. v. *Linde Co.*, 336 U.S. 271 (1949)	10
Indians of California, 98 C. Cls. 583	3, 9

STATUTES:

Act of May 28, 1928, 45 Stat. 602	3
Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049	3

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OPINIONS BELOW

The opinion of the Indian Claims Commission (Pet. App. 4) is reported at 13 Ind. Cl. Comm. 89. The Court of Claims did not write an opinion.

JURISDICTION

The final order of the Court of Claims was entered July 8, 1964 (Pet. App. 1). The petition for a writ of certiorari was filed October 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C. § 1255(1) and § 20(c) of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, 1054 (25 U.S.C. § 70s(c)).

QUESTION PRESENTED

A representative claim was filed in the Indian Claims Commission by certain individual Indians on behalf of an identifiable group of Indians known as the Indians of California (and including substantially all decendents of Indians residing in California in 1852) to recover for lands in California taken by the United States. The claim was opposed by certain Indian tribes in California including petitioner who filed their separate claims for certain California lands. The Commission determined that the representative claim did not include tribal Indians with individual tribal claims; restricted the identifiable group represented to unorganized, nontribal Indians; and sustained the right to recover in the representative claim for nontribal lands only. The Commission also sustained tribal claims for other lands. Thereafter, the representative claim as confined and restricted by the Commission, was compromised and settled with the United States and it developed that the land claimed by a tribe (petitioner whose separate claim had been sustained by the Commission) was thought to be not as valuable as the land left to the representative claim.

The question is whether petitioner, the Quechan Tribe, may change its earlier position and at this late

date participate as a matter of right in the settlement and throw its land into the settlement, without the consent of respondents or defendant, simply because to participate could mean a larger recovery for its members than they would receive for their less valuable land if the tribe's claim is disposed of separately.

STATEMENT

Following enactment of the Indian Claims Commission Act, 60 Stat. 1049 (25 U.S.C. §§ 70a-70w), some sixteen separate suits were filed in the Commission seeking compensation for the taking of original Indian title to all lands in California except lands paid for pursuant to the judgment of the Court of Claims in *Indians of California*, 98 C. Cls. 583 (1943). Among the claimants were respondents Thompson and Risling who filed representative claims on behalf of the identifiable group of Indians known as the Indians of California and then defined as those Indians residing in California on June 1, 1852, and their descendents as enrolled pursuant to the Act of May 28, 1928, 45 Stat. 602. Among the other claims filed were those of petitioner and other organized Indian tribes seeking recovery for certain tribal lands wholly or partly in California.

The claims of respondents and petitioner overlapped to the extent that respondents asserted the right to represent all California Indians and to recover on their behalf for all California lands not paid for in *Indians of California, supra.* In the same way respondents' claims overlapped the claims of other tribes for certain California lands.

Opposition of the defendant, petitioner and other tribal claimants to respondents' representative claims

led the Commission, on January 20, 1958, to deny respondents' claims to represent all California Indians. The Commission ruled that other claimants, including petitioner, all of whom had tribal organizations, could maintain their separate claims for California lands. 6 Ind. Cl. Comm. 87 (Appendix A, *infra.*) It was said by the then Chief Commissioner, in his separate opinion, that respondents' claim of representation was limited to "the Indians whose tribal connections had been lost because of extinction of tribal identity or tribal organization * * *." Appendix A, p. 17. The opinion of the two associate Commissioners stated that the separate tribal organizations, including petitioner, could assert their respective claims and "recover for such [lands] as they may prove they had Indian title to when the defendant acquired them * * * as to such lands * * * [respondents] have no right to make claim therefor." Appendix A, p. 19.

Following the restriction of respondents' claims as to land and people, the Commission ordered that all of California be divided into two parts.[1] "Area A" was to include the lands claimed by petitioner and other tribal groups. Respondents' claim was confined by the order to "Area B" which included "all lands within the State of California, except those in Area A * * *."[2] As the Commission stated, "the primary purpose of dividing the State into two parts is to limit the land claim of * * * [respondents] to all that part of Cali-

---

[1] Order of October 6, 1958, pursuant to the Commission's opinion of that date. 6 Ind. Cl. Comm. 666.

[2] The actual boundary line between Areas A and B was fixed by expert testimony and by stipulation between the parties including petitioner and has not been involved in any controversy since that time.

fornia not included in the claims of those tribes or groups [including petitioner] that have filed cases for specific areas in the State." 6 Ind. Cl. Comm. 666, 671.

At the time of the division of California into "Area A" and "Area B", the Yokiah, Yana and Shasta Indians were permitted, with the approval of respondents, to merge their claims with respondents. 6 Ind. Cl. Comm. 674.[3] While this opportunity was then also open to other Indian groups, no other group of Indians sought to merge with respondents. All other groups, including petitioner, insisted upon maintaining their separate claims.

On July 31, 1959, the Commission sustained respondents' claim of original Indian title to the lands in "Area B", and ordered that the case proceed to the determination of value, as of March 3, 1853, of the "Area B" lands less certain additional lands excluded by the Commission. 8 Ind. Cl. Comm. 1, 39c. Respondents and the United States both appealed to the Court of Claims, the United States attacking the Commission's order of liability for lands in "Area B", and respondents attacking, *inter alia,* the restriction of their claim to "Area B" and to nontribal Indians. Petitioner and the other separate tribal organizations were given notice of the respondents' appeal.

Petitioner's right to recover for the lands separately claimed by it in "Area A" was sustained by the Commission on September 30, 1959. 8 Ind. Cl. Comm. 111A.

Following the docketing of the appeals in the Court of Claims and the filing of briefs, counsel for the respondents and for the United States engaged in long

[3] Thus Area B included the land claimed by the Yokiah, Yana and Shasta who merged with respondents.

and involved negotiations looking toward a compromise settlement of the litigation. In order to resolve certain factual and legal questions that arose, including an overlap of claimed lands which was caused by the Mission Indians' amendment of their claim to include land in "Area B" and the identity of some of respondents' Indians and Pit River Indians, it was proposed by way of compromise that the claims of the Mission Indians and Pit River Indians be consolidated with the claims of respondents, as restricted by the Commission, for purposes of settlement. All counsel concerned agreed upon terms of a stipulation for the entry of one judgment in the consolidated cases for $29,100,000, subject to approval by the Indians concerned, the Secretary of the Interior and the Commission.

The proposed settlement did not include any lands embraced in petitioner's claim.

According to the stipulation for settlement, the judgment was to be owned equally by all persons represented in the claims of the Mission and Pit River Indians and of respondents. It was further stipulated, however, that it would be left to the Indian Claims Commission or to Congress to determine whether for purposes of sharing in the judgment the class represented by respondents should include Indians represented in the separate tribal claims including petitioner's claim.

By means of a series of twenty meetings held at various locations in California and in some cases mail ballots, all supervised by the Department of Interior, the settlement proposed was presented to and accepted by the Indians involved in the settlement. All of the voting by Indians was upon a proposal restricted to

the lands claimed by the respondents in "Area B" as limited by the Commission in 1958, *supra*, pp. 4-5 plus the lands claimed by the Mission Indians and the Pit River Indians, and to the offsets asserted by the defendant against those groups only.

The settlement as proposed to and accepted by the Indians did not involve payment for any lands claimed by petitioner and did not include any offsets which the United States may have against petitioner.

While negotiations were in progress for the settlement of the claims of respondents, as restricted by the Indian Claims Commission in area and Indians represented, and of the claims of the Mission and Pit River Indians, petitioner sought to force its participation in the settlement by attempting to intervene in the appeals then pending in the Court of Claims which had been taken by respondents and the United States from the Commission's interlocutory order of liability of July 31, 1959.

Petitioner filed its petition for intervention in the Court of Claims on November 19, 1963, asserting that the Indians of the Quechan Tribe were members of the class represented by respondents and complaining that they were excluded from the settlement. The question presented to the Court of Claims was whether members of the Quechan Tribe were represented in respondents' representative claims, as restricted by the Commission. To resolve this question, the Court of Claims, on February 20, 1964, remanded to the Commission for its determination "the issue as to whether or not said intervenors [petitioner] are proper parties in the cases here on appeal, and if so their interest therein * * *." Appendix B, *infra*, p. 23.

The Commission's opinion and order on the remanded issue were entered on March 3, 1964 (Pet. App. 2, 4). The order of the Commission said, in part:

> It is determined that the Quechan Tribe of the Fort Yuma Indian Reservation is not a proper party in the cases of Clyde F. Thompson, et al., and Ernest Risling, et al., as representatives of the Indians of California, which cases are now on appeal before the United States Court of Claims.

In its opinion the Commission reviewed the California claims' litigation so far as pertinent to the issue remanded by the Court of Claims and concluded, in response to the assertion of the Quechan Tribe that the proposed settlement would prejudice the tribe's rights (Pet. App. 9-10):

> We can see no basis for such a contention. The proposed compromise settlement in no way affects the claims of the Quechan Tribe. The lands claimed by the Quechan Tribe are excluded from the area involved in the proposed settlement. The members of the Quechan Tribe are not members of the identifiable group represented by the petitioners in Dockets 31 and 37 [respondents]. * * *

Following the determination of the Indian Claims Commission the Court of Claims entered an order on July 8, 1964, denying the petition for intervention and affirming the March 3, 1964, order of the Commission (Pet. App. 1).

After the approval of the proposed settlement by the Indians involved it was presented to and approved

by the Secretary of the Interior. Following the Court of Claims' denial of the petitioner's attempted intervention, the settlement was presented to the Indian Claims Commission for approval and the Commission entered its final judgment on July 20, 1964, in the amount of $29,100,000 (Pet. App. 11). An amount to pay the judgment was included in the Supplemental Appropriation Act of October 7, 1964, 78 Stat. 1023, and the judgment has been paid pursuant thereto.

ARGUMENT

1. Petitioner is seeking review of a mere fact question ruled against it by concurrent findings of the tribunals below. That question is the membership of the class in respondents' representative claims. Both the Indian Claims Commission and the court below are thoroughly familiar with the California Indians claim litigation which has been before both the Court of Claims, *Indians of California,* 98 C. Cls. 583 (1943); *Clyde F. Thompson,* 122 C. Cls. 348 (1952), cert. den. 344 U.S. 856; and the Commission for many years. The Commission had occasion to consider the scope of respondents' representative claims on three occasions prior to the ruling now in controversy. The Commission considered the question first when the class represented was limited to the disorganized nontribal Indians, 6 Ind. Cl. Comm. 87 (1953), Appendix A, *infra;* second, when the State of California was divided into the "Area A" lands claimed by tribes such as petitioner and the "Area B" remaining lands left to petitioner, 6 Ind. Cl. Comm. 666 (1958); and third, when the Commission ruled against the government and in favor of respondents on their restricted claims, 8 Ind. Cl. Comm. 1 (1959). The Commission again ruled, on March 3, 1964, that the claims of respond-

ents' as restricted by its prior rulings, do not include petitioner's lands and people (Pet. App. 2, 4). The Court of Claims affirmed the ruling (Pet. App. 1). This concurrent determination of fact as to the class involved in respondents' claims by the Commission and the court below will be accepted by this Court. *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

2. Petitioner does not have an interest in respondents' claims now compromised and settled with the United States. The claims, as restricted by the Indian Claims Commission in 1958, 6 Ind. Cl. Comm. 87, and the ensuing settlement included only California lands **not** embraced within the pending claims of organized tribes such as petitioner. Respondents were left with the lands which petitioner and other tribes did not claim. Petitioner has never asserted a claim for any lands awarded by the Commission to respondents. None of the lands within the settlement is within the area claimed by or awarded to Quechan in the separate litigation which it has successfully maintained before the Commission. 8 Ind. Cl. Comm. 111A, September 30, 1959. Moreover the final judgment entered by the Commission in respondents' cases as consolidated for settlement with the cases of the Mission Indians and Pit River Indians (Pet. App. 11) does not affect petitioner's docket in the Commission but leaves petitioner to further deal with its own case as it may choose, free of the restrictions which had once existed when respondents sought unsuccessfully, and over petitioner's own protest, to sue for petitioner's lands and people.

3. Implicit in what is acknowledged by petitioner (Br. 14) is the point that petitioner's land is believed to be less valuable than the lands included in the settlement. Consequently petitioner's members stand to re-

ceive more money from a settlement in which their land is added to the more valuable lands of others than they apparently expect to receive by the separately litigating or settling their tribal claim on its own merits.

As the Commission pointed out in its opinion (Pet. App. 9), "the question as to which group of claimants are to be included in compromise negotiations is between the parties involved and defendant." Not all land in California was of the same value at the date fixed for valuation. Proximity to market, resources, climate and a host of additional factors are weighed in determining land value. The parties to the settlement, after prolonged negotiations, were able to agree upon land values and offsets so that a settlement satisfactory to all concerned could be effected. The Indian parties further agreed among themselves, because of overlapping land claims[4] and the identity of some Pit River Indians, that all Indians represented in the settlement would own the judgment equally.

In its simplest terms, petitioner's complaint is that the defendant is not willing to compromise and settle petitioner's litigation on a basis as favorable as that obtained by other claimants for other California lands. Therefore petitioner seeks to participate in respondents' settlement, because under the compromise procedure established between the Indian parties to the settlement, individual Indians represented will own equal shares and petitioner sees in this the potential

[4] After the representative claims of respondents had been sustained by the Commission, the Mission Indians amended their claim to include certain lands awarded to the representative claims, creating an overlap.

advantage of a greater recovery for its members at the expense of others if it can participate upon the same terms. Petitioner seeks an equal share without an equal contribution.

4. No question of general application is involved in this proceeding. No other tribal claimant for lands in California has objected to the settlement of respondents' claims. Petitioner and other tribal groups elected years ago to go their separate ways and to prosecute their separate claims without respondents. Of the remaining ten tribal claimants, only petitioner has attempted to interfere with respondents' claims and apparently only because hindsight suggests petitioner chose the less profitable course.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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November 1964

APPENDIX A

6 Ind. Cl. Comm. 87

BEFORE THE INDIAN CLAIMS COMMISSION

CLYDE F. THOMPSON, et al., (Indians of Calfornia)	Docket No. 31
ERNEST RISLING, et al., (Indians of California)	Docket No. 37
46 BANDS OF MISSION INDIANS	Docket No. 80
THE NORTHERN PAIUTE NATION, et al.	Docket No. 87
THE SOUTHERN PAIUTE NATION, et al.	Docket No. 88
KLAMATH AND MODOC TRIBES AND YAHOOSKIN BAND OF SNAKE INDIANS	Docket No. 100
YOKIAH TRIBE OF INDIANS, et al.,	Docket No. 176
YANA TRIBE OF INDIANS	Docket No. 215
COLORADO RIVER INDIAN TRIBES, et al.	Docket No. 283
THE WASHOE TRIBE OF THE STATES OF NEVADA AND CALIFORNIA	Docket No. 288
MOHAVE TRIBE OF INDIANS, et al.,	Docket No. 295
THE QUECHAN TRIBE OF THE FORT YUMA RESERVATION, CALIFORNIA	Docket No. 319
PAUL JAKE, et al., EACH ON THEIR OWN BEHALF AND ON BEHALF OF THE SOUTHERN PAIUTE NATION OF INDIANS,	Docket No. 330
SHASTA TRIBE, et al.,	Docket No. 333
PITT RIVER INDIANS	Docket No. 347
CHEMEHUEVI TRIBE, et al.,	Docket No. 351
Plaintiffs,	

v.

THE UNITED STATES OF AMERICA, *Defendant.*

Decided: January 20, 1958

Opinions of Commissioners

SEPARATE OPINION OF CHIEF COMMISSIONER WITT

As to the question of whether or not the Indians of California, petitioners in Dockets Nos. 31 and 37, have

the exclusive right to present claims to the Indian Claims Commission relating to the lands of California does not present any issue of fact (all facts involved being undisputed), I decide said question, and that alone, by this decision.

There is nothing in the language of the Indian Claims Commission Act which supports the contention that the Indians of California have the sole and exclusive right and power to sue and recover on claims for the lands in California. To the contrary, the expressed provisions of Section 10 of said act are otherwise. This section reads as follows:

> "Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but *wherever any tribal organization exists,* recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group, *such organization shall be accorded the exclusive privilege of representing such Indians,* unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission." (Italics supplied)

It is plain from this provision that there is only one situation where the act grants an *exclusive* right and power to sue, namely, where a tribe, band, or group has a governing body recognized by the Secretary of the Interior as having authority to represent such tribe, band, or group and where such governing body is not guilty of fraud, collusion, or laches in the bringing of the suit. In other situations, the act applies the doctrine of representative suits and authorizes any member of any tribe, and, or identifiable group to sue for the benefit of all its members. The Indians of California do not have a tribal organization or governing body, nor is it contended that they have. However, the respective petitioning tribes in Dockets Nos. 87,

88, 100, 330, 283, 288, 295, 319, 351 and 347 each alleges it is a tribal organization and is recognized by the Secretary of the Interior as having authority to represent such tribe. It is not contended that such tribal organization or any of them are guilty of any of the delinquencies that would deny them exclusive rights to assert their respective claims.

The contention of the Indians of California for the exclusive right and power to sue and recover on claims for the lands in California is claimed to be derived from the Act of May 18, 1928. If the contention of the Indians of California for such exclusive right is sustained, this would nullify the above quoted (and underscored) provision of Section 10 and also would nullify the provision of Section 15 of the Indian Claims Commission Act which authorizes tribes to present their claims through attorneys of their own selection; and also would nullify the provision of Section 2 of the Indian Claims Commission Act which provides that said Commission shall hear and determine claims "on behalf of any Indian tribe, band, or other identifiable group of American Indians, residing within the territorial limits of the United States or Alaska."

There can be no doubt as to the meaning of Sections 2, 10, and 15 as hereinabove referred to. These provisions constitute a positive and unambiguous authorization of Indian tribes claiming ownership of lands which were taken by the United States to sue and recover from the United States for such taking, if liability is established. The construction which the petitioners in Dockets Nos. 31 and 37 seek would be a nullification of the rights of tribal claimants as provided in said Indian Claims Commission Act and a nullification of the duty of the Indian Claims Commission to hear and determine such tribal claims.

In *Thompson* v. *The United States* (122 C. Cls. 348), the Court of Claims held that for the purpose of presenting claims to the Commission, the Indians of California (petitioners in Dockets Nos. 31 and 37) were an identifiable

group of American Indians within the meaning of Sections 2 and 10 of the Indian Claims Commission Act. I find nothing in said decision of the Court of Claims, however, holding that said petitioners in Dockets Nos. 31 and 37 have the exclusive power and right to present to the Commission and the exclusive right to recover on claims relating to the lands of California. Neither of the two said issues were presented to the Court of Claims in said case. They were not considered by the Court of Claims, and it is my view they were not decided by the Court of Claims.

The Act of 1928, relied on by petitioners, defines the Indians of California as being "all Indians who were residing in the State of California on June 1, 1852, and their descendants," and petitioners allege they are this group; and this group doubtless includes many, if not all, the persons belonging to tribal plaintiffs in the tribal suits, as well as the Indians whose tribal organizations had ceased to exist. However, said act states that such definition was "for the purpose of the Act"; that is for the purpose of the law suit therein authorized.

In discussing the history of the 1928 Act, the Court of Claims in the Thompson case, above referred to, states, among other things, that:

> "After the cession of California to the United States by the Treaty of Guadalupe Hidalgo of July 4, 1848, thousands of white people entered the State of California, and as a result of this great influx of white people the various bands, groups and communities of Indians which had up to that time existed in more or less distinct Indian fashion, were disrupted; many were killed and those remaining were driven from their places of abode and scattered throughout the State. As a result of this treatment of the Indians in Calfiornia and the policies of the United States thereafter pursued with respect to them, the existence and life of the Indians of California, as bands or groups

> which had previously existed were disrupted and destroyed and such tribes, bands or separate groups constituting villages, have not since that time existed, and for this period of 100 years these Indians have been known only as the 'Indians of California.' "

Elsewhere the Court said:

> The Indians of California who had many years ago lost their identity as distinct tribes, band or villages, had been pressing theirs claims before Congress for many years, and we think it is clear that in enacting the Indian Claims Commission Act, Congress intended to confer upon the Indian Claims Commission jurisdiction to hear and determine such claims.

It seems evident that it was the view of the Court of Claims that Congress created the group "the Indians of California" to represent the Indians whose tribal connections had been lost because of extinction of tribal identity or tribal organization by disruption, destruction, death forced abandonment of their homes, etc.

By permitting the prosecution by the tribal organization that claim to have survived of their claimed losses of land, while at the same time permitting the petitioners in Dockets 31 and 37 to maintain their actions, I think we are carrying out the wishes of Congress as indicated by the Act of 1928, as construed by the Court of Claims, and are not doing violence to the provisions referred to in the act creating the Indian Claims Commission and providing its jurisdiction.

In passing, I will say that the willingness of said petitioners in Dockets 31 and 37 to waive all rights as to approximately 1,600,000 acres in the State of California, involved in Docket No. 100; does not seem reconcilable with the claim of exclusive right of prosecution for all lands in California. This waiver would seem to be an admission

by petitioners in Dockets Nos. 31 and 37, that the Act of May 18, 1928 does not constitute an absolute bar to the suit for or recovery by a tribal claimant on a claim relating to lands in California. If the law as contended for by petitioners in said docket numbers gives said petitioners the exclusive right to prosecute claims for lands in California, this would be a jurisdictional matter and could not be thus waived.

In regard to the contention made by petitioners that to permit the several tribal claimants to maintain their claims would work unfairness and injustice by reason of the fact that members of such tribes have participated in the judgment previously recovered by reason of the 1928 Act, and offsets by reason of expenditures made in behalf of said respective tribes have been allowed against other Indians, it is my view that those matters can be controlled by the distribution of any awards, either by direction of the Indian Claims Commission or by Congress. Petitioners in Docket Nos. 31 and 37 themselves seem to admit that this can be done (see petitoiners' brief, p. 22 and footnote).

Therefore, I am of the opinion that the tribal claimants in Docket Nos. 87, 88, 100, 330, 283, 288, 295, 319, 351 and 347 are each entitled to present and have determined their respective claims relating to lands in California; and that the petitioners in Dockets 31 and 37 can prosecute claims for all lands in California not recovered in the tribal suits.

I am of the opinion that the facts involved are undisputed, and the statements in this decision are sufficient and additional findings of fact unnecessary, but I would consider any contention by any party hereto to the contrary, and any findings requested.

I see no reason for changing orders in Dockets 80, 176, 215, and 333. The petitioners in these cases should be permitted, in my judgment, to *try* to recover as independ-

ent tribes, if they should fail as members of Indians of California. Alternative bases of relief are well recognized rights—and assertable as desired, and especially applicable to California Indians because of their confused condition.

EDGAR E. WITT
Chief Commissioner

SEPARATE OPINION OF COMMISSIONER O'MARR
IN WHICH COMMISSIONER HOLT JOINS

I have read with much interest the opinion of Chief Commissioner Witt and concur in his conclusions that the claimants in Dockets Nos. 87, 88, 100, 283, 288, 295, 319, 330, 347 and 351, may, as they have done, assert claims for lands within the State of California and may recover for such as they may prove they had Indian title to when the defendant acquired them; that as to such lands the Indians of California (petitioner in Dockets Nos. 31 and 37) have no right to make claim therefor. As to the claims set forth in the dockets referred to above, it may be stated that, with the exception of the Quechan Tribe, Docket No. 319, and the Pitt River, Docket No. 347, all those claimants assert claims for lands which extend into California from contiguous areas in the adjoining state of Nevada or Arizona. The Quechan and Pitt River claims are for lands within the borders of California and the Indians of California have waived all claim to Modoc (Docket 100) lands in California.

Aside from the claim of the Indians of California in Dockets 31 and 37, and the claims in the ten dockets mentioned above, there are four Indian groups who have filed claims for lands located entirely within California. They are the Mission Indians, Docket No. 80, Yokiah Tribe, Docket No. 176, Yana Tribe, Docket No. 215, and Shasta Tribe, Docket No. 333. In their petitions, each of these four groups base their claim on Indian title to specific areas of land in that state.

his opinion, the Chief Commissioner refers to the groups who have made stipulations (hereafter set with the Indians of California by this language:

I see no reason for changing orders made in Dockets , 176, 215 and 333. The petitioners in these cases ould be permitted, in my judgment, to *try* to recover s independent tribes, if they should fail as members Indians of California. Alternative bases of relief re well recognized rights—and assertable as desired, nd especially applicable to California Indians because f their confused condition.

e record in this case shows that in 1955 the Indians lifornia and each of said four groups made separate ations as to the handling of their respective claims. tipulations are substantially the same and I set forth ollowing pertinent parts of the stipulation entered by the Indians of California and the Yokiah Tribe, et No. 176, as typical of the others:

1. Docket No. 176, with the consent of the Indian Claims Commission, may be held in abeyance pending he final determination of consolidated Docket Nos. 31 and 37 insofar as Docket No. 176 asserts any claim for compensation based on original Indian title to land in California.

2. If the plaintiffs in consolidated Dockets Nos. 31 and 37, or either of them, should recover compensation for the lands in California, formerly owned by original Indian title by the Indians in California, including the area claimed by petitioners in Docket No. 176, as is more particularly set forth in the petitions in consolidated Dockets Nos. 31 and 37, this case, Docket No. 176, may be dismissed, insofar as Docket No. 176 seeks compensation for lands in California formerly owned by original Indian title.

3. If it should be finally adjudicated that the plaintiffs in consolidated Dockets Nos. 31 and 37, or either

> of them, should not recover compensation for the lands in California, formerly owned by original Indian title, including the lands claimed by petitioners in consolidated Dockets Nos. 31 and 37, this case, Docket No. 176, shall be brought on for trial without prejudice to the plaintiffs in Docket No. 176 and with the same rights as if Dockets Nos. 31 and 37 had never been tried.

This stipulation was followed by an order permitting it to be filed and directed the handling of such claims in accordance with the terms of the stipulation.

The orders in Dockets Nos. 215 and 333 varied from those in Dockets Nos. 80 and 176 only in that they expressly approved the stipulations while there is no such express provisions in the orders in Dockets Nos. 80 and 176.

A reading of the petitions of the Indians of California (Dockets Nos. 31 and 37) shows that these Indians claim compensation for all lands in the State of California, except confirmed grants, and by their briefs maintain that they have the exclusive right to assert a claim for all the California lands, except Modoc lands. As to the granted lands, however, we need not, and do not, for the purposes of this discussion, determine whether they are or are not included as part of the area claimed in the petitions. It is in any event obvious that at the time the stipulations and the orders referred to above were made the Indians of California were contending, as they now are, that they have the exclusive right to claim compensation for all lands in California. The four groups by becoming parties to the stipulation agreed to this theory of the Indians of California, for, it would seem, that unless the Indians of California had such right there would be no basis for the stipulations since the stipulations do not purport to assign the claims of any of the four claimants or authorize the Indians of California to assert claims for them or on their behalf. The contrary is apparent, for by express

provisions of the stipulations and orders the claims are merely "held in abeyance without prejudice to the plaintiffs [claimants] * * * pending the final determination of consolidated Dockets Nos. 31 and 37." It is true, of course, that the stipulations provide for a dismissal of such petitions should the Indians of California recover for lands, which include the lands of said four groups, but they also provide for the contingency that should the Indians of California fail to obtain such a recovery each stipulator could assert its claim independently of the Indians of California. Obviously, the stipulations were based upon the possibility that the Indians of California would be adjudged to have the exclusive right to recover for all lands in the state, including those of the stipulators.

Now that all members of the Commission are agreed that claims for large segments of California lands may be asserted and maintained by the ten tribal claimants independently of the Indians of California, I find no logical or legal basis for holding that the Indians of California may include as part of their claim the lands of the Mission Indians, the Yokiah, Yana and Shasta Tribes, which are claimed in their separate cases. Certainly, the only possible basis for treating them differently is the fact that they entered into the stipulations above referred to which, as I have stated above, do not, in my opinion, change their status as litigants before this Commission, nor that of the Indians of California insofar as permitting them to include in their claims lands of these four groups.

For the reasons mentioned above, I believe the claims of the four groups—Mission Indians, Yokiah, Yana and Shasta—be proceeded with the same as was done with the other ten claims, except the Modoc, and that the same be set down for trial in the reasonably near future. In this connection, it appears that there is already in the record evidence concerning the areas used and possessed by each of these four groups and since such evidence is made available for use by all parties to the consolidated hearing

there should be no great delay in concluding such cases. It may be that the parties desire to rely upon the evidence already in the record, in which event further hearings on the four cases should not be required.

LOUIS J. O'MARR
Associate Commissioner

WM. M. HOLT
Associate Commissioner

APPENDIX B

IN THE UNITED STATES COURT OF CLAIMS

App. No. 2-61

THE UNITED STATES, *Appellant-Appellee*

v.

CLYDE F. THOMPSON, ET AL. and ERNEST RISLING, ET AL
Appellants-Appellees

THE QUECHAN TRIBE OF THE FORT YUMA INDIAN RESERVATION, *Intervenors*

Order

This appeal comes before the court at this time on a motion filed December 18, 1963, by the United States and supported by the Clyde F. Thompson, et al. and Ernest Risling, et al. parties in which it is requested that the petition in intervention filed in this appeal by the Quechan Tribe of the Fort Yuma Indian Reservation be dismissed, or in the alternative that the issue raised by said petition in intervention be remanded to the Indian Claims Commission for its determination. The petition in intervention was filed December 20, 1963, following the court's allowance on June 21, 1963, of the Quechan's unopposed motion for leave to intervene.

Upon consideration thereof together with memorandum in opposition and reply as well as the motion to accelerate filed January 28, 1964,

It Is Ordered that the motion by the United States be and the same is granted to the extent that the court's order of June 21, 1963, allowing the present petition in intervention to be filed is vacated and withdrawn, and the issue as to whether or not said intervenors are proper parties in the cases here on appeal, and if so their interest therein, is remanded to the Indian Claims Commission for its determination. It is further directed that the Commission proceed with said determination with all due haste in order that this appeal which remains before this court in all other respects may proceed.

By the Court
Marvin Jones
Chief Judge

Feb. 20, 1964

Judge Davis took no part in the consideration and decision of this matter.

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FILED

In the

Supreme Court of the United States

October Term, 1964
No. 362

THE QUECHAN TRIBE OF THE FORT YUMA RESERVATION,

Petitioner,

vs.

CLYDE F. THOMPSON, *et al.*, and ERNEST RISLING, *et al.*, members, and as the representatives of, and on the relation of the INDIANS OF CALIFORNIA,

and

THE UNITED STATES OF AMERICA,

Respondents.

Reply Brief of Petitioner to Brief for Clyde F. Thompson, et al.

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SUBJECT INDEX

Page

Reply brief of Petitioner to brief for Clyde F. Thompson, et al. 1

Appendix. 6 Ind. Cl. Comm. 674 .....App. p. 1

TABLE OF AUTHORITIES CITED

Case

Thompson v. The United States, 122 Ct. Cls. 348..... 4

IN THE

Supreme Court of the United States

October Term, 1964
No. 562

THE QUECHAN TRIBE OF THE FORT YUMA RESERVATION,

Petitioner,

vs.

CLYDE F. THOMPSON, *et al.*, and ERNEST RISLING, *et al.*, members, and as the representatives of, and on the relation of the INDIANS OF CALIFORNIA,

and

THE UNITED STATES OF AMERICA,

Respondents.

Reply Brief of Petitioner to Brief for Clyde F. Thompson, et al.

The brief in opposition for Clyde F. Thompson, *et al.*, contains a statement which, without explanation, is misleading, and is inaccurate as of the present time. This statement is "The Commission determined that the representative claim did not include tribal Indians with individual tribal claims; restricted the identifiable group represented to unorganized, nontribal Indians; and sustained the right to recover in the representative claim the nontribal lands only." (p. 2 of brief for Clyde F. Thompson, *et al.*).

The opinion of the Commission, upon which the foregoing statement is based (p. 4 of the brief), is 6 Ind. Cl. Comm. 87, it is printed as Appendix A (beginning at page 13), of the brief in opposition. That decision dealt primarily with the question of whether the Indians of California, as represented by Thompson, *et al.*, had the exclusive right to present claims to the Indian Claims Commission for the taking of land in California. It was held unanimously that the Indians of California did not have such exclusive right, and that the tribal claimants were entitled to present and have determined their respective claims for the taking of their own land.

Prior to this decision, certain tribal claimants had joined with the Indians of California under stipulations which gave them the right to withdraw and to proceed with their own cases, should it be eventually determined that the Indians of California could not recover. A majority of the commission expressed the view that these stipulations were no longer proper, and that the tribal claimants in question, being the Mission Indians, the Yokiah, Yana and Shasta Tribes, should withdraw and proceed on their own (p. 22 of brief in opposition). The Mission Indians did later withdraw, 6 Ind. Cl. Comm. 666 at 669-671, but have now been readmitted.

The Yokiah, Yana and Shasta Tribes made a motion for modification of the opinion in this respect, which was unsuccessful, and, in the alternative, moved that their cases be consolidated for all purposes with that of the Indians of California. In other words, they moved to intervene on precisely the same terms as the Quechan later moved for leave to intervene. This motion was granted. 6 Ind. Cl. Comm. 674. The opinion of the

Commission is printed in the Appendix to this brief. As a result of this opinion, it is clear that there is no justification for the attempt on the part of Thompson, *et al.*, to create the impression that prior orders of the Commission have restricted the Indians of California to unorganized nontribal Indians, and that the statement hereinabove quoted is inaccurate and misleading.

It was only during the interval between the ruling of January 20, 1958, 6 Ind. Cl. Comm. 87 (Appendix A of the brief in opposition), and the ruling of October 6, 1958, 6 Ind. Cl. Comm. 674 (Appendix to this brief), a period of a little over eight months, that there was in existence a determination by the Commission that the representative claim did not include tribal Indians with individual tribal claims, and that the identifiable group in the main case was restricted to unorganized nontribal Indians.

The question presented in this case might be stated as being whether the Quechan should be penalized for not having made their motion for leave to intervene, or the equivalent, at the time when such a motion was made by the Yana, Shasta and Yokiah Tribes. Bearing on that question, these points should be noted:

None of the commission's orders ever required that the tribal claimants make an election within any certain time, or at all, as to whether they would continue with their own suits or intervene in the main action, and of course there was no notice of any such requirement. If such a requirement had been made, the tribal claimants who were in a position to prove aboriginal occupancy of a specific area in California would have been faced with a decision which would have required them to give

up a certain and known right, perhaps irrevocably, in order to obtain what would probably be in most cases, a larger recovery by participation in the main case, when it was by no means certain that recovery could be had in the main case. The government vigorously contended at all times that the decision of the Court of Claims in *Thompson v. The United States,* 122 Ct. Cls. 348, was procedural only, and that the petitioners in the main case would have to prove occupancy of specific areas by specific tribes, which all concerned knew to be an impossible task for most of California.

Under these circumstances, it is submitted that a requirement of election should not be implied, and that the Commission should have required election only by a clear and unequivocal order to that effect, made after notice to all tribal claimants. The order of October 6, 1958, 6 Ind. Cl. Comm. 674, printed *infra,* which in effect permitted intervention by the Yana, Shasta and Yokiah tribes, certainly did not require an election or set any time limit for intervention by other tribal claimants. On the contrary, it is clear, as stated on page 5 of the brief in opposition, that the opportunity was open to other groups.

To the argument, which was accepted by the Commission, and, also, presumably, by the Court of Claims, that the segregation was finally effected by the so-called A and B order, 6 Ind. Cl. Comm. 66, and the judgment of liability, 8 Ind. Cl. Comm. 1, the answer is that these orders, both of which were interlocutory, made no express requirement of election, and the procedure for consolidation, "merger", intervention or whatever it might be called, would have been just as simple after

these orders as before; and the argument that these orders imply a requirement of election is rebutted by the fact that the Pit River and Mission Indians were permitted to come in after those orders. For this purpose, the device was adopted of simply making a settlement agreement with those tribes, without the necessity of their formally intervening or moving to consolidate their cases. The consolidation was effected by the final judgment, pursuant to stipulation. The terms of consolidation are exactly the same as the terms upon which the Quechan seek to intervene, —that is to say, by the participation of members of those tribes equally in the judgment with other members of the class, and giving up the right to recover separately for their own land, the value of which will be added to the fund.

There was never any intention by the Quechan to make an election, as evidenced by the fact that they filed a brief as *amicus curiae* on the appeal in the main case, supporting the position of the Indians of California as to the measure of proof required, and asking the Court of Claims to define the terms upon which they might be permitted to intervene. Up until the time when the motion for leave to intervene was filed, the Quechan had simply taken the position that it was best for them to await developments. In this connection, it should be noted that at the time the motion for leave to intervene was filed, the settlement had not been reached, and the Quechan had no means of knowing what the amount would be. There was no opposition to the motion by either of the respondents, and it was allowed by the Court of Claims on June 21, 1963. The Quechan had every right to assume that they were then in the case, but they were nevertheless excluded from the settlement.

When the controversy was submitted to the Indian Claims Commission, the Court of Claims, on its own motion, set aside its prior order allowing the motion for leave to intervene, presumably with a view to leaving the entire matter open for the Commission's decision. If any question of timeliness is involved, we submit that the respondents have waived their rights in that regard, by their failure to object to petitioner's motion for leave to intervene.

The important point, so far as time is concerned, is that there has been no prejudice to the respondents by any delay of the petiioner. If the Quechan had intervened at the time when the Yana, Shasta and Yokiah tribes "merged" their cases with the main case, the result would have been exactly the same as it will be if the Quechan are now permitted to intervene. The Quechan would have shared equally with all others in the main case, as they now seek to do. The value of their land would have been added to the recovery in the main case, which they now offer to do, and the liability of the United States would have been precisely the same.

The brief in opposition seeks to make it appear that the question involved is one of fact. This is clearly not the case. There can be no doubt that the Quechan are in fact members of the class, Indians of California. The question is simply whether any of the technical grounds which have been urged as justification for denying them the right to intervene in the class suit, are valid. This question must be decided in the light of the fact not only that three members of the class intervened earlier, but that two other members of the class, the Pit River Indians and the Mission Indians, who had followed pre-

cisely the same course as petitioner, were permitted, in effect, to intervene, after the petitioner's motion for leave to intervene was filed.

In regard to the statement on page 9 of the brief of Thompson, *et al.,* referring to the supplemental appropriation act of October 7, 1964, 78 Stat. 1033, and stating ". . . the judgment has been paid pursuant thereto", we are advised that the money has been made available to the proper authorities for the benefit of the Indians, and is now drawing interest, but that there has not been any distribution to individual Indians. In any event, the judgment is not final so far as the Quechan are concerned, until this Court has ruled.

The question is one of general application, not only because the specific problem involves a large number of people, but because the law of class suits is in a state of confusion, particularly with regard to the settlement of such suits. It is again urged that the decision below departed from the usual course of judicial proceedings, in that it was not decided upon the merits, but was based upon technicalities which cannot be justified, with the result that there has been discrimination between members of a class in the settlement of a class suit.

Respectfully submitted,

WM. DOUGLAS SELLERS,
Attorney for Petitioner.

FULTON W. HOGE,
Of Counsel.

APPENDIX.

6 Ind. Cl. Comm. 674.

BEFORE THE INDIAN CLAIMS COMMISSION

Clyde F. Thompson, et al. (Indians of California) [Docket No. 31].

Ernest Risling, et al. (Indians of California) [Docket No. 37].

Yokiah Tribe of Indians, et al. [Docket No. 176].

Yana Tribe of Indians [Docket No. 215].

Shasta Tribe, et al. [Docket No. 333] Petitioners, v. United States of America, Defendant.

Decided: October 6, 1958

Appearances: Ernest L. Wilkinson, Reginald E. Foster, Charles Kasch, Milton Fenton, Laurence A. Schroeder, Jr., Attorneys for Petitioners.

Ralph A. Barney, with whom was Mr. Assistant Attorney General, Perry W. Morton, Attorneys for Defendant.

O'Marr, Commissioner, delivered the opinion of the Commission.

On June 6, 1958, the Indians of California, Dockets Nos. 31 and 37, the Yokiah Tribe, Docket No. 176, the Yana Tribe, Docket No. 215 and the Shasta Tribe, Docket No. 333, joined in a motion requesting—

> "* * that the order of consolidation of Nov. 1953, wherein the aforesaid Dockets 176, 215 and 333 were 'consolidated for trial' with Dockets 31 and 37, be amended to provide that the aforesaid Dockets 176, 215 and 333 be consolidated in their entirety for all purposes, including judgment, with the aforesaid Dockets 31 and 37."

The defendant filed its response to such motion on June 18, 1958, stating that on certain specified conditions it did not object to the motion.

To fully understand the purpose and scope of the motion it is necessary to look at the explanation of it by the attorney representing all the parties thereto. At the argument of the motion (pp. 4124-4126) of Transcript of June 23, 1958, Docket No. 31 et al.) the attorney said about the motion:

> Now, there is a second motion filed in order to establish a fair and orderly method of procedure and that is the motion filed by Dockets Numbers 31 and 37 and Dockets Numbers 176, 215 and 333, in which we seek alternative relief.
>
> First, a granting of our motion of March 25, 1958 about which I have just been talking, holding that that is the fair and orderly way to dispose of this question. The alternative would be, and only if the Commission should rule against us on the first alternative, that these cases be consolidated for all purposes hereafter.
>
> That would mean that we would have one case proceeding, we would have consolidated five cases—six cases—and proceeding as one action, the different party plaintiffs and the procedure necessary and the substantive law applicable to the case would be just as if we had five cases merged so that we had one case with six different party plaintiffs and the applicable law would then govern the proceedings.
>
> * * *
>
> Commissioner O'Marr: Before you get into that, Mr. Barker, do these six groups that you

have just referred to, you say on your alternative plan that you would consider those cases consolidated for all purposes, including judgment. I am merely inquiring if we were to adopt your alternative plan, would there be separate judgments for each one of these four groups and the description of the lands involved?

Mr. Barker: No, your Honor. It is our view there would be one judgment. I misstated myself and I should have said five cases because Docket Number 80 was not joined in this motion.

Should they see fit to come in the scope of this motion, we have indicated we would be willing to have them come in. Actually, there would be five.

Commissioner O'Marr: I understand that we are talking about the groups in the stipulated class.

Mr. Barker: The answer to your question would be we envisage one judgment on behalf of all of the group and they would all share in that judgment as Indians of California.

The point being here that as your case proceeds, we have one consolidated case as if it were one action with the claimants, Clyde F. Thompson, et al, in Docket Number 31 and Ernest Risling, et al, in Docket Number 37, the Yokiah Tribe of Indians in 176, the Yana Tribe in Docket Number 215, and the Shasta Tribe in Docket Number 333, all with separate attorneys of record.

* * *

O'Marr: Would the lands be separately described, the boundaries of the land of the four groups?

Mr. Barker: It is our thought that the land would not be separately described in the four groups under this proceeding.

The above explanation makes it plain that it is proposed to have us consider the claims of the Yokiah, Yana, Shasta (for lands in California), and Indians of California as though they had joined in a single action and a judgment entered on that basis. Such a judgment would no doubt be a final determination of the rights of each of the parties joining in the motion for lands in California.

We see no objection to the proposed arrangement and an order will accordingly be made.

Since the above plan removes the question of the rights of the Yokiah, Yana and Shasta to assert their claims separately from the claim of the Indians of California (Dockets 31 and 37), which was the question basic to the Commission's decision of January 20, 1958, 6 Ind. Cls. Com. 93-97, there is no need for modifying that decision. Moreover, it would seem to follow that the approved consolidation constitutes an abandonment of the stipulations the three tribes made with the Indians of California, however, the effect of the consolidation is perhaps not directly involved and need not be passed upon at this time.

Louis J. O'Marr
Associate Commissioner

We concur:

Edgar E. Witt
Chief Commissioner

Wm. M. Holt
Associate Commissioner

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	9

CITATIONS

Cases:	
Minnesota Chippewa Tribe v. *United States*, 315 F. 2d 906	9
Thompson v. *United States*, 122 Ct. Cl. 348, certiorari denied, 344 U.S. 856	4
Statutes:	
Act of May 18, 1928, 45 Stat. 602	3, 8
Indian Claims Commission Act of August 13, 1946, 60 Stat. 1049, *et seq.*:	
Section 2, 10 U.S.C. 70a	2, 3
Section 10, 25 U.S.C. 70i	2, 3
Section 21, 25 U.S.C. 70t	9
Section 22, 25 U.S.C. 70u	9

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 562

THE QUECHAN TRIBE OF THE FORT YUMA RESERVATION, PETITIONER

v.

CLYDE F. THOMPSON, ET AL., AND ERNEST RISLING, ET AL., MEMBERS, AND AS THE REPRESENTATIVES OF, AND ON THE RELATION OF THE INDIANS OF CALIFORNIA AND THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the Court of Claims (Pet. App. 1) is unreported. The opinion of the Indian Claims Commission (Pet. App. 4–10) is reported at 13 Ind. Cl. Comm. 89.

JURISDICTION

The judgment of the Court of Claims was entered on July 8, 1964 (Pet. App. 1). The petition for a writ of certiorari was filed on October 5, 1964. The jurisdiction of this Court is invoked under 28 U.S.C.

1255(1) and Section 20(c) of the Indian Claims Commission Act of 1946, 60 Stat. 1055, 25 U.S.C. 70s(c).

QUESTION PRESENTED

Whether the Indian Claims Commission and the Court of Claims correctly denied petitioner's petition to intervene on behalf of its members as a class in a suit wherein a stipulated judgment has been entered in favor of a different class.

STATUTE INVOLVED

The relevant sections of the Indian Claims Commission Act of 1946, 60 Stat. 1049, 25 U.S.C. 70, *et seq.*, provide:

> Section 2 (25 U.S.C. 70a):
>
> The Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska: * * * (4) claims arising from the taking by the United States, whether as the result of a treaty of cession or otherwise, of lands owned or occupied by the claimant without the payment for such lands of compensation agreed to by the claimant; * * *
>
> Section 10 (25 U.S.C. 70i):
>
> Any claim within the provisions of this Act may be presented to the Commission by any member of an Indian tribe, band, or other identifiable group of Indians as the representative of all its members; but wherever any tribal organization exists, recognized by the Secretary

of the Interior as having authority to represent such tribe, band, or group, such organization shall be accorded the exclusive privilege of representing such Indians, unless fraud, collusion, or laches on the part of such organization be shown to the satisfaction of the Commission.

STATEMENT

In 1951, petitioner, the Quechan Tribe, filed a claim against the United States under the Indian Claims Commission Act to recover compensation for the taking of specific lands in California and Arizona. Other tribes filed thirteen similar suits with respect to California lands. In addition to these tribal actions, identical class actions (Nos. 31 and 37) were brought by Thompson and Risling ("respondents"), respectively, each purporting to represent the "Indians of California," a group comprising all persons enrolled under that designation pursuant to the Act of May 18, 1928, 45 Stat. 602.[1]

In 1952, the Court of Claims, reversing a decision of the Indian Claims Commission, held that the "Indians of California" were an "identifiable group of American Indians" within the meaning of Sections 2 and 10 of the Act (*supra*, p. 2), and that the Com-

[1] The 1928 Act, which is not directly involved here, was a special statute authorizing the attorney general of California to submit claims for compensation to the Court of Claims on behalf of the "Indians of California"—defined as "all Indians who were residing in the State of California on June 1, 1952, and their descendants now living in said State"—and providing for the establishment of rolls listing all members of that class.

mission therefore had jurisdiction to hear the claim brought by Thompson on their behalf. *Thompson* v. *United States*, 122 Ct. Cl. 348, certiorari denied, 344 U.S. 856.

In the ensuing proceedings before the Commission (the *Thompson* and *Risling* suits having been consolidated), the government and several tribal claimants (including the Quechan Tribe) challenged respondents' standing to represent all California Indians and, in the case of the tribes, insisted upon the right to prosecute their own separate claims. On January 20, 1958, the Commission ruled that respondents did not have the exclusive right to represent all Indians in California and that other claimants, including petitioner, were free to maintain their own suits. Chief Commissioner Witt in his separate opinion, implied that the class represented by respondents included only those Indians "whose tribal connections had been lost because of extinction of tribal identity or tribal organization * * *" (see Br. in Opp. of respondents Thompson and Risling, p. 17), while the two associate commissioners declared that the Indians of California "have no right to make claim" for the lands formerly held by the tribes which had sued on their own behalf (*id.* at 19).

In October 1958, the Commission ordered that California be divided into two zones: "Area A," including all lands claimed by the Quechans and the other tribal groups; and "Area B," to which respondents' class action was explicitly confined, comprising the rest of the State. The express purpose of this bifur-

cation was "to limit the land claim of * * * [respondents] to all that part of California not included in the claims of those tribes or groups that have filed cases for specific areas in the State" (6 Ind. Cl. Comm. 666, 671). While it was open at that time for all tribal groups to merge their claims with the class action, only three (the Yokiahs, Yanas, and Shastas) did so; the others, including petitioner, preferred to rely on their separate suits.

On July 31, 1959, the Commission held the United States liable to respondents for the value of the "Area B" lands (with certain exceptions) as of March 3, 1853.[2] 8 Ind. Cl. Comm. 1, 39. Both the United States and respondents appealed to the Court of Claims—the government challenging the order of liability, and respondents protesting the restriction of their class to non-tribal Indians claiming "Area B" lands.

On September 30, 1959, the Commission held the government liable to the Quechan Tribe for the value, as of 1853, of the specific lands claimed by them in "Area A."

Meanwhile, respondents and the government entered into negotiations looking to a settlement of the class action. The Mission and Pit River Indians, whose claims overlapped those of the "Indians of California," were permitted on that ground to consolidate their suits with respondents' class action for settlement purposes. At length the attorneys agreed

[2] The regular procedure of the Commission is to adjudicate liability and then later determine the amount of recovery.

upon the terms of a proposed settlement whereby a single judgment of $29,100,000 would be entered in the consolidated cases, subject to approval by the Indians concerned, the Secretary of the Interior and the Commission. The approval of the Indians was obtained at some twenty meetings held in various parts of California and, in some instances, by means of mail ballots, all supervised by the Secretary. The compromise thus accepted by the Indians pertained only to lands claimed by respondents in "Area B" and by the Mission and Pit River Indians; it did not involve any lands claimed by petitioner.

On November 19, 1963, while the settlement negotiations were still in progress, the Quechan Tribe filed a formal petition to intervene in the appeals then pending in the Court of Claims from the order of the Commission adjudicating the government's liability to respondents. The Tribe urged that its members belonged to the class which respondents represented and therefore were entitled to participate in the settlement. To resolve this question, the Court of Claims remanded the case to the Commission, which concluded on March 3, 1964, that the Quechan Tribe was not a proper party to respondent's suit. The Court of Claims, on July 8, 1964, affirmed the Commission and denied intervention. It is that decision which the Quechan Tribe asks this Court to review.

The proposed settlement, after its approval by the Indians, was presented to and approved by the Secretary of the Interior. On July 20, 1964, the Commission added its imprimatur, entering judgment for $29,100,000 (Pet. App. 11–12). Congress has appro-

priated funds for payment of the judgment and they have been deposited in the Treasury to await a plan of distribution.

ARGUMENT

Petitioner argues that it was entitled to intervene in the *Indians of California* case because its members belonged to the class represented by the respondents. That contention is groundless. The Indian Claims Commission ruled in its January 20, 1958, order and reiterated in its order of March 3, 1964 (Pet. App. 8), that respondents' representation extended only to those Indians who were not represented by a specific tribal entity in a separate suit. That conclusion was urged upon the Commission by petitioner itself (among others), which insisted upon the right to maintain a separate action on behalf of its own members and declined to consolidate that action with the *Indians of California* case while it was still before the Commission.

The decision below in no way affects petitioner's right to prosecute its own independent suit to recover the value of the specific lands it claims in "Area A." Whether members of the Quechan Tribe will obtain a larger per capita recovery through this avenue than they would as participants in the settlement is still a matter of conjecture and, in any event, is beside the point. Having voluntarily elected to sever their fortunes from those of the unaffiliated Indians and to pursue a separate remedy, they cannot reasonably complain of their exclusion from the settlement table. Enlargement of the settlement proceedings to include the Quechans and the many other claimant tribes

would have greatly complicated the negotiations and endangered the chances for agreement. And to permit the petitioner to intervene at this late date would require the cancellation of the settlement arrangement so laboriously arrived at—a settlement which took no account of the land claimed by the Quechans.

Nor does it aid petitioner that two other tribes, the Mission and Pit River, were permitted, with the consent of the parties, to consolidate their suits with the *Indians of California* case. Those tribes were admitted to the settlement solely because their claims overlapped and conflicted, in part, with those asserted by the respondents. No such consideration applied to the petitioner. And, in any event, as the Commission noted, "[t]he question as to which groups of claimants are to be included in compromise negotiations is between the parties involved and defendant. The reasons and merits for including or excluding certain groups is not an issue before us" (Pet. App. 9).

It is immaterial, moreover, that most members of the Quechan Tribe are listed on the rolls prepared by the Secretary of the Interior under the 1928 Act. Congress expressly stated (45 Stat. 602, § 1) that the definition of "Indians of California" contained in that statute, and consequently the rolls set up to identify such Indians, were "for the purposes of this Act"; they have no relevance to suits under the Indian Claims Commission Act. It is conceivable that those rolls may be utilized in determining the persons to whom the distribution of the $29,100,000 judgment should be made. But the distribution of funds ap-

propriated for the payment of Indian Claims Commission awards is subject to the direction of Congress, not the Commission, and is not presently before this Court. See Sections 21, 22 of the Indian Claims Commission Act of August 13, 1946, 60 Stat. 1055, 25 U.S.C. 70t, 70u; *Minnesota Chippewa Tribe* v. *United States*, 315 F. 2d 906, 914, fn. 11 (Ct. Cl.). Thus, as the Commission noted, "[a]ny question as to how the 1928 Act enrollment or any other enrollments might be utilized in effecting any distribution of an award is beyond our jurisdiction and responsibility" (Pet. App. 9).

The issue presented has no general importance and there is no conflict. Further review, therefore, is unwarranted.

CONCLUSION

For the reasons given, we respectfully submit that the petition for a writ of certiorari should be denied.

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DECEMBER 1964.

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IN THE

Supreme Court of the United States

October Term, 1964
No. 562

THE QUECHAN TRIBE OF FORT YUMA RESERVATION,
Petitioner,

vs.

CLYDE F. THOMPSON, *et al.*, and ERNEST RISLING, *et al.*, members, and as the representatives of, and on the relation of the Indians of California and the United States of America.

On Petition for a Writ of Certiorari to the United States Court of Claims.

REPLY BRIEF OF PETITIONER TO BRIEF FOR THE UNITED STATES.

In its statement of the question presented, the United States begs the question, by assuming that the Indians for whom judgment has been entered in the main case are a different class from the petitioning tribe. (Br. in Opp. of U. S. p. 2.) It may be urged in reply that petitioner, in its statement of the question presented, also begs the question, by assuming that the petitioner and the other tribes are members of the same class. (Pet. p. 2.) The difference is that the petitioner's assumption is founded on facts which are undisputed.

The class action by the respondents Thompson and Risling was filed on behalf of the Indians of California, as defined in terms of the 1928 Act, being "all Indians

who were residing in the State of California on June 1, 1952, and their descendants now living in said State". (Br. in Opp. of U. S. p. 3, Fn 1.) The settlement agreement in the main case defined the phrase, "Indians of California" as "all members of a class or group consisting of descendants of 'all those California Indians who were residents of California on June 1, 1852'" (Pet. p. 9.) The question was left open of whether the Quechan and certain other Indians could participate, but none of the parties questions the fact that all members of the Quechan tribe are within the stated definition. (Pet. p. 9.) It follows that, from a factual standpoint, the assumption made by the petitioner in its statement of the question presented, is correct, and the assumption made by the United States in its statement of the question is erroneous.

The question involved is one of law, and not of fact. In determining what the question is, it should be noted that all of the parties are in agreement that the Quechan could have intervened at the time when the Yana, Shasta and Yokiah tribes came in to the main case. (Br. in Opp. of Thompson, *et al.*, p. 5; Br. in Op. of the U. S. p. 5.) As stated by the respondents, these tribes "merged" their claims with that of the main group. (Br. in Opp. of Thompson, *et al.*, p. 5, of U. S. p. 5.) Their members will share in the judgment equally with all other members of the class, Indians of California, without regard to how many people there are in these tribes, or the value of their lands, which they contributed to the whole. No inquiry as to these factors was made by the Commission. (Reply Br. of Pet. to Br. of Thompson, App. 3.) It is clear, therefore, that these tribes were considered to be, in fact, members of the class Indians of California, and that they had the optional right, either to

pursue their own claims, or to join with the main group.

The question then becomes one of whether anything has happened since the intervention of the Yana, Shasta and Yokiah tribes, which would prevent any other member of the class, such as the Quechan, from taking the same step. This should, we believe, depend only upon whether subsequent orders of the Commission have established a cut-off date, beyond which intervention cannot be permitted, and whether, even in the absence of such limitation, it would be prejudicial to other members of the class to permit intervention by the Quechan at this time.

As we have pointed out, none of the orders expressly require an election. We submit that none of them by implication require, or was intended to require, an election on the part of members of the class, within any certain time, to proceed with their own cases, or to intervene in the main action. At one time, the view of the majority was that the independent tribes had no choice, and that they would have to separately prosecute their own claims. This was the opinion of January 20, 1958, 6 Ind. Cl. Comm. 87. (Br. of Thompson, App. A.) That position was changed, when the three independent tribes intervened. 6 Ind. Cl. Comm. 674 (App. Pet. Reply to Br. of Thompson.)

If, and to the extent that any subsequent orders can be construed as requiring an election, and we do not believe they can be so construed, the orders have been modified by the subsequent admission of the Mission Indians and the Pit River Indians. They have come in as members of the class, to participate in the single judgment. (Pet. 8-9, Pet. App. 11-12.)

The brief of the United States is in error in its statement to the effect that claims of both the Mission and the Pit River Indians overlapped those of the "Indians of California". This is stated to be the only ground for permitting those tribes to consolidate their suits with the *Indians of California* case. (pages 5 and 8 of U. S. brief). On reference to page 6 of the brief in opposition, for Thompson, *et al.*, it appears that the Mission Indians, whose land, of course had been placed in Area A by order of the commission, amended their claim to include some land in Area B. As to the Pit River Indians, there is only the bare statement of a question as to "the identity of some of respondents' Indians and Pit River Indians." The nature of this question is not explained. However, the fact is, as we have pointed out, and it has not been and cannot be denied, that all of the Quechan Indians are precisely in the same classification as those represented by the respondents, Thompson and Risling.

On the question of prejudice, there would be no more change in the situation if the Quechan are admitted now, than there would have been if they had been admitted earlier. They would then have participated with the other Indians of California, on an equal basis, in the single judgment, and their California land would have been included in the valuation. That will be the result of intervention now.

At page 6, the brief of the United States refers to the series of meetings held to approve the settlement, and at page 8, it says, "and to permit the petitioner to intervene at this late date would require the cancellation of the settlement arrangement so laboriously arrived at — ". As the record shows, this is precisely the type of *ad hoc*

argument, which was strenuously urged before the Commission and the Court of Claims. It is invalid, for two reasons. In the first place, inconvenience should not be a ground for unfair treatment of members of a class, and in the second place, it is not true. In the stipulation, which was approved by the Indians at the various meetings, the question was expressly left open as to whether or not the Quechan and other members of the class, not then included in the settlement, would be entitled to participate in the single judgment fund. (Pet. p. 9) The Commission has now made this determination. In its opinion (Pet. App. 8) it says:

"Of course it is incumbent upon this Commission to determine the ownership of a claim. We must in our awards define the tribe, band or identifiable group entitled to the judgment."

In the final judgment (Pet. App. 12), it is specified "that said determination or judgment be a single judgment in favor of all of the petitioners (as representatives of the tribe, bands or groups on whose behalf said petitions were presented, as construed and defined by our order of March 3, 1964, in Dockets 31, 37 and 319) as a single class." The order of March 3, 1964, to which this refers is the order, affirmed by the Court of Claims, of which the petitioner complains (Pet. App. 1, 2 and 3.)

Any intimation, if it is so intended, in the brief for the United States (pages 8-9), that it is still open to Congress to enlarge the class, is erroneous. Under Section 22(a) of the Indian Claims Commission Act, 60 Stat. 1049, a determination by the Commission has "the effect of a final judgment of the Court of Claims". Congress has wide discretion in the manner of paying

such a judgment, and in fact does not generally pay over money to the Indians in the case of an Indian judgment, but the group entitled to the judgment in this case has been determined by the Commission, and there is no reason to think that Congress would change it, even if it could do so.

At any rate, no further meetings would be required by the Indians who have approved the settlement, because their approval was given on the express understanding and statement that such a determination would be made.

In conclusion, we submit that no valid reason has been given for discriminating against the petitioner in the settlement of the class suit, and that the unfair treatment of a large number of people who are members of a dependent nation justifies the review by this Court.

Respectfully submitted,

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December, 1964.